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SUMMARY OF ARGUMENT IN REPLY

Respondent's Brief in Opposition ("BIO"), like the decision below, rests on the view that this Court's per curiam opinion does not mean what it says and therefore does not command rigorous adherence. Though this Court concluded that the Texas special issues did not provide an adequate vehicle for considering Petitioner's mitigating evidence because they "had little, if anything, to do with the mitigation evidence petitioner presented," *Smith v. Texas*, 543 U.S. 37, 48 (2004)), Respondent suggests that this holding is not binding because "the remark is not supported by any *Penry I* analysis or a cite to case law." BIO at 12. In similar fashion, Respondent critiques this Court's insistence that capital sentencing schemes must allow jurors to give "'*full* consideration and *full* effect to mitigating circumstances,'" *Smith*, 543 U.S. at 37 (quoting *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*) (emphasis in original), because Respondent maintains that such a rule would "fl[y] in the face" of a prior Court decision. BIO at 16, n.7. The tenor of Respondent's argument, like that of the decision of the CCA, underscores the central justification for this Court to grant certiorari in this case: this Court's opinions, especially those summarily reversing state court judgments, must be followed whether or not the state court or the district attorney are fully persuaded by their logic or doctrinal pedigree. Proceedings on remand should not be an occasion for disappointed state actors to reassess the wisdom of this Court's decisions, and this Court should neither tolerate nor reward the methodology embraced by the CCA and endorsed by Respondent of picking and choosing among the Court's conclusions depending on whether they deem them persuasive.

With respect to the merits, the CCA's finding of no "egregious harm" directly contradicts

this Court's firm and unequivocal conclusion that jurors were unable to give effect to Petitioner's mitigating evidence. Respondent urges that is entirely a matter of state law how to frame the test for harm relating to federal constitutional error. Whatever the merits of that position, the CCA's "no harm" conclusion rested entirely on its rejection of this Court's federal constitutional judgment that jurors were in fact unable to give constitutionally adequate effect to Petitioner's mitigating evidence in light of all that transpired at trial. Accordingly, even if the CCA were authorized to impose its "egregious harm" standard on remand, its application of that standard cannot stand where it contradicts this Court's federal constitutional judgment.

Moreover, the CCA's decision to impose the "egregious harm" standard on remand -- based on Petitioner's purported failure to make an appropriate objection to the sentencing instructions at trial -- constitutes an impermissible effort to frustrate this Court's enforcement of federal constitutional norms. The CCA refused to find Petitioner's claim procedurally defaulted prior to this Court's intervention, and its belated assertion of such a procedural obstacle is without justification. Accordingly, the appropriate inquiry on remand should have been whether the federal constitutional error identified by this Court was harmless beyond a reasonable doubt, and the CCA's own account of Petitioner's extensive mitigating evidence precludes a finding of no harm.

1. **_Certiorari_ is warranted because the CCA's basis for denying relief on remand was identical to its argument that this Court rejected in its summary reversal. The CCA's reassertion of its dissent from this Court's *Penry II* jurisprudence challenges this Court's preeminent role in constitutional interpretation and warrants this Court's intervention.**

In its opinion that this Court summarily reversed, the CCA asserted that the nullification

instruction clearly informed jurors of their ability to change their answers to the special issues if they believed that Petitioner's mitigating evidence warranted leniency. 132 S.W.3d at 416. Two judges on the CCA went further and emphatically voiced their disagreement with this Court's controlling precedent, indicating that "we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding, and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case," 132 S.W.3d at 427 (Hervey, J., joined by Keasler, J., concurring), employing a "*But see*" citation form to refer to *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). Those two judges also insisted that "the Constitution does not require a vehicle to accord 'full' weight to a defendant's mitigation evidence," 132 S.W.3d at 427, notwithstanding this Court's express declaration to the contrary in *Penry II*. 532 U.S. at 797.

In its summary reversal of the CCA decision, this Court explicitly rejected the CCA's holding that the sentencing instructions in this case, in the context of the trial, adequately facilitated consideration of Petitioner's mitigating evidence. First, this Court indicated that the purported clarity of the instruction was still undermined by the prosecutor's insistence that jurors "follow the law" and answer the special issues affirmatively if the State met its burden of proof, 543 U.S. at 48 n.5, and the fact that the actual verdict form "made no mention whatsoever of mitigation evidence." *Id.* at 48. More important, this Court assumed for the purposes of argument that the nullification message was sufficiently clear but concluded that such clarity "could possibly have intensified the dilemma faced by ethical jurors." *Id.* From the perspective of this Court, "even if we were to assume that the jurors could easily and effectively have

comprehended an orally delivered instruction directing them to disregard, in certain limited circumstances, a mandatory written instruction given at a later occasion, that would not change the fact that the 'jury was essentially instructed to return a false answer to a special issue in order to avoid a death sentence.'" *Id.* (quoting *Penry II*, 532 U.S. at 801).[1]

On remand, in its decision presently before this Court, the CCA again argues that the nullification instruction was sufficiently clear for jurors to give effect to Petitioner's evidence, especially given the fact that the jurors "[o]verwhelmingly" agreed on voir dire that they could "change a 'yes' answer to 'no' if instructed by the judge to do so upon finding sufficient mitigating evidence." 185 S.W.3d at 468. Two judges on the CCA again reject the "full consideration and full effect" standard, instead maintaining "that the Constitution requires only that a jury be provided with a vehicle to meaningfully consider mitigating evidence and not, as the Court's opinion seems to decide, a vehicle to 'fully and completely consider mitigating evidence.'" 185 S.W.3d at 473 (Hervey, J., joined by Keasler, J., concurring). Those two judges join the majority in asserting that because the nullification instruction was "carefully explained to the jurors during voir dire," no *Penry II* harm occurred. Having recast their pre-remand conclusion of "no *Penry II* violation" into a post-remand holding of "no *Penry II* harm," these judges defiantly reassert that "we are not bound by the view expressed in *Penry II* that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case." 185 S.W.3d at 474.

Respondent, taking the same tack, defends the CCA opinion on remand by likewise

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[1] This Court also reaffirmed, in the first paragraph of its decision, that the appropriate test for assessing capital sentencing instructions is whether they "allow the jury to give *full* consideration and *full* effect to mitigating circumstances." 543 U.S. at 38 (internal quotations and citations omitted) (emphasis in original).

ridiculing this Court's repeated articulation of its individualization standard, describing the Court's language as a "suggestion" rather than binding precedent. BIO at 16, n.7 ("[T]he 'full consideration' rule suggested in this Court's per curiam opinion flies in the face of this valid and binding precedent") (referring to *Johnson v. Texas*, 509 U.S. 350 (1993), which is unfavorably cited in both *Penry II*, 532 U.S. at 797, and this Court's summary reversal in *Smith*, 543 U.S. at 38, 46). Respondent also insists that this Court's holding that the deliberateness and dangerousness special issues were inadequate to facilitate consideration of Petitioner's mitigating evidence[2] was not truly binding because this Court failed to offer support for its conclusion. BIO at 12 ("This remark suggests that the statutory issues may be insufficient if an analysis were made, but the remark is not supported by any *Penry I* analysis or a cite to case law.").

The CCA opinions and the Respondent's defense together reflect an unwillingness to toe the constitutional mark. Respondent insists that no compelling reason exists for this Court to grant review because Petitioner can obtain "the federal harmless error analysis he desires" in federal habeas corpus. BIO at 17. Petitioner's basis for certiorari is not that he deserves a federal forum for reviewing the harmfulness of the constitutional error,[3] but rather that state courts may not repeatedly and openly reject binding precedent from this Court. This ground for certiorari is particularly compelling when the defiance transparently follows this Court's uncommon exercise of its summary reversal power, and the state court advances precisely the same arguments that the summary reversal unequivocally rejected.

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[2] "Just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Smith*, 543 U.S. at 48.

[3] The well-known limitations on the scope of federal habeas review, including the substitution of reasonableness review for de novo review of federal constitutional claims adjudicated in state court, obviously diminish the

2. The CCA's purported "egregious harm" analysis undertakes precisely the same inquiry as this Court's merits analysis and reaches the opposite conclusion. The CCA holding is therefore inconsistent with this Court's remand.

In the CCA's view, supported by Respondent, this Court's opinion found only a "theoretical" possibility that jurors would be unable to give effect to Petitioner's mitigating evidence, 185 S.W.3d at 468, and a close examination of the events at trial revealed that jurors in fact likely understood their ability to nullify their answers to the special issues. This conclusion misrepresents and misunderstands this Court's opinion. This Court did engage in a contextualized evaluation of the nullification instruction, finding that the prosecution's admonition to jurors to "follow the law" in fact complicated the nullification message and that "the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed." 543 U.S. at 48 n.5. Moreover, this Court emphasized that the verdict form did not make any "mention whatsoever of mitigation evidence," *id.* at 48, again undermining any confidence that jurors would have believed themselves empowered to give effect to such evidence by untruthfully answering the special issues. More to the point, this Court's conclusion of Eighth Amendment error required not merely a finding on an abstract defect in the sentencing instructions in isolation but a finding that the instructions *in fact* likely prevented jurors from giving effect to mitigating evidence "in the light of all that ha[d] taken place at the trial." *Boyde v. California*, 494 U.S. 370, 381 (1990); *see also Penry II*, 532 U.S. at 800 (citing *Boyde* as governing standard in assessing whether, in the context of the trial, there is "a reasonable likelihood" that the challenged instruction interfered with jurors' consideration of

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prospects of Petitioner receiving federal habeas relief based on the state court's misuse of its egregious harm standard.

mitigating evidence). This Court ultimately concluded that even the clearest nullification instruction cannot avoid the "ethical problem" of requiring jurors to lie in order to give effect to mitigating evidence. 543 U.S. at 47.

Notwithstanding the clarity of this Court's reasoning, the CCA identifies three aspects of Petitioner's trial to support its view that jurors both understood and could follow the nullification instructions: the nullification instruction was carefully explained to each juror, 185 S.W.3d at 468, the prosecution did not tell jurors to ignore Petitioner's mitigating evidence, *id.* at 471, and defense counsel offered extensive mitigating evidence and argument in support of defendant's position that his life was "worth saving." *Id.* at 472. Reliance on these facts obviously ignores the Court's ultimate conclusion that even clear nullification instructions are unworkable because they place ethical jurors in an intractable ethical dilemma. Such selective canvassing of facts also ignores this Court's express view that the prosecution's closing argument and the verdict form contradicted the claim of clarity advanced by the CCA in its original opinion. In short, the CCA's opinion on remand ignores this Court's own evaluation of the sentencing instructions within the context of Petitioner's trial and rejects as well this Court's insistence that no context whatsoever can render nullification instructions a reliable means of facilitating consideration of mitigating evidence.

Particularly unconvincing is the CCA's assertion that because Petitioner's counsel "did a superb job of weaving [Petitioner's mitigating] evidence into a compelling theory of the case," 185 S.W.3d at 472, the jury was more likely to understand itself to be empowered to give effect to Petitioner's "extensive mitigating evidence," *id.* at 471, and hence Petitioner suffered no

egregious harm. The strength of Petitioner's mitigating case suggests precisely the opposite. Because this Court concluded that the nullification instruction, in the context of Petitioner's trial, did not afford a reliable means of facilitating consideration of Petitioner's evidence, the fact that defense counsel offered a "compelling theory of the case" based on Petitioner's "extensive" mitigation compels the conclusion that Petitioner suffered "egregious harm" as a result of the constitutional violation found by this Court.

Overall, the CCA's "egregious harm" test, in focusing on the events at trial to determine whether jurors were in fact precluded from giving effect to mitigating evidence, precisely replicates this Court's inquiry for assessing whether Petitioner was deprived of his right to individualized sentencing. Having framed the inquiry in this way, the CCA may not ignore the facts that this Court deemed most salient in making that assessment. Nor may the CCA contradict this Court's ultimate conclusions that the context of Petitioner's trial aggravated rather than mitigated the failings of the special issues in combination with the nullification instruction and, in any event, that context cannot overcome the inherent ethical dilemma posed by nullification instructions in capital sentencing. Thus, even assuming that the CCA was permitted to impose its "egregious harm" standard on remand, its conclusion of no harm cannot be reconciled with this Court's explicit holding that jurors were unable to give constitutionally adequate effect to petitioner's mitigating evidence in light of all that transpired at trial.[4]

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[4] Respondent, gamely trying to defend the CCA's revisiting of the merits of Petitioner's claim, urges that the "egregious harm" test is less onerous than the "federal" test for harm. BIO at 20. In the abstract, this seems unlikely, because the federal constitutional harmless error test requires a finding beyond a reasonable doubt that the constitutional error did not contribute to the verdict whereas the "egregious harm" test as framed by the CCA asks more broadly whether a defendant's trial on the whole was "fair and impartial." 185 S.W.3d at 464, 467 n.38. But Respondent is undoubtedly accurate in viewing the egregious harm test as less demanding in its application in this case, because the test, as implemented by the CCA, merely duplicates the analysis for assessing whether constitutional error occurred in the first place. To the extent the egregious harm test asks whether the error at trial

3. **The CCA's imposition of an "egregious harm" standard on remand based on Petitioner's purported failure to object at trial cannot be squared with the CCA's prior rulings in this case or Texas law, and thus represents an illegitimate effort to nullify the consequences of this Court's exercise of appellate review.**

When this Court exercised its discretionary authority to review the prior CCA opinion in this case, it did so with an awareness that the CCA had declined to impose any procedural obstacle to the merits review of Petitioner's claims under *Penry I* and *Penry II*. As this Court noted, although "[f]our judges [below] would have found petitioner's claim procedurally defaulted, [t]he majority of the court . . . reached petitioner's claims on the merits." 543 U.S. at 43 n.3. On remand, though, the CCA insists that Petitioner failed to make a proper objection to the nullification charge at trial and therefore must demonstrate "egregious harm" to warrant relief.

As an initial matter, this sort of "bait and switch" approach to procedural default constitutes an improper manipulation of this Court's appellate jurisdiction. This Court scrupulously avoids addressing federal constitutional claims that are controlled by state law principles because to do so would run afoul of Article III. Moreover, the vindication of state law interests is hardly served by ignoring them unless and until state interpretation of federal law is rejected. For these reasons, the CCA's refusal to impose state procedural obstacles prior to this Court's remand must be deemed a definitive holding that the CCA cannot revisit simply to avoid the effect of this Court's decision. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 244-45 (1959). Indeed, the CCA's refusal to recognize a procedural obstacle until remand suggests strongly that the imposition of the obstacle represents not routine application of state

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actually inhibited juror consideration of mitigation evidence in the context of Petitioner's trial, it adds nothing to *Boyde*'s requirement for individualization error, and that error was conclusively established by this Court as it

law principles but hostility to the enforcement of a federal right.

Respondent nonetheless contends that the CCA's imposition of its "egregious harm" test on remand, based on Petitioner's purported failure to make a contemporaneous objection, is typical of the CCA's treatment of similar claims on state habeas. Moreover, Respondent contends that the CCA's decision not to procedurally default Petitioner's claim based on the same facts prior to the remand was likewise appropriate because unpreserved jury charge errors are routinely addressed on state habeas notwithstanding the lack of an appropriate objection at trial. BIO at 28. The facts of this case and established caselaw belie Respondent's assertions.

a. The CCA's decision not to procedurally default Petitioner's federal constitutional claim prior to remand for lack of a contemporaneous objection in fact reflected a determination by the CCA that Petitioner had adequately preserved that claim.

The four CCA judges who concurred in the judgment prior to remand, insisting that Petitioner's claim was procedurally defaulted, clearly asserted than such claims were defaulted as a matter of state law in the absence of a contemporaneous objection. Moreover, Respondent urged precisely the same argument after this Court summarily reversed the CCA's original decision, stating without qualification that "Applicant has procedurally defaulted this claim under Texas law because he did not raise any objection to the charge at trial or on appeal." State's Brief on Remand ("SBR") at 7 (attached as Appendix 11) (citing the concurring opinions from the CCA's decision denying relief prior to the remand). Although Respondent now claims that "Texas law does not generally allow for procedural default of jury charge error when a defendant fails to object at trial," BIO at 28, Respondent repeatedly said the opposite in its brief on remand and offered extensive citations in support of that proposition. *See* SBR at 4 ("Under Texas case

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considered the context of Petitioner's trial.

law, Eighth Amendment claims may be defaulted by the failure to object at trial."). Indeed, Respondent's Brief on Remand encouraged the CCA to find Petitioner's claim procedurally defaulted for lack of a contemporaneous objection because the "Supreme Court will not review a decision by a state's highest court if it rests on a state law ground independent and adequate by itself to support the result." SBR at 8. Having unequivocally argued in its brief on remand that Petitioner's claims were procedurally defaulted based on Petitioner's failure to make a contemporaneous objection to the charge, and having done so in order to gain the strategic advantage of insulating the CCA judgment from further review by this Court, it is astonishing that Respondent now insists that "Texas law simply [does] not permit it." BIO at 28. Respondents points to no intervening caselaw to justify its startling about face.

Indeed, there is no law -- intervening or otherwise – supporting Respondent's position. The sole case Respondent cites, *Jimenez v. State*, 32 S.W.3d 233 (Tex. Crim. App. 2000), held only that jury charge error can be reviewed *on direct appeal* for "fundamental error" and does not address whether such claims can be forfeited for purposes of state habeas review. On the other side, a recent federal district court decision has concluded that Texas has consistently and routinely defaulted federal constitutional claims on state habeas based on noncompliance with Texas's contemporaneous objection rule, including claims involving federal constitutional challenges to Texas jury instructions. See *Martinez v. Dretke*, 426 F. Supp.2d 403, 527 (W.D. Tex. 2006) ("Petitioner alleges no facts and cites this Court to no Texas case law showing the Texas courts have inconsistently applied the contemporaneous objection rule in similar contexts, i.e., with regard to alleged constitutional errors in a jury charge."). Indeed, that court could find

"no instances in which the Texas Court of Criminal Appeals has entertained the merits of a claim challenging the constitutionality of a punishment-phase jury charge when raised for the first time in a state habeas corpus application. On the contrary, the Fifth Circuit has long recognized a federal habeas petitioner's failure to comply with the Texas contemporaneous objection rule as an adequate and independent state procedural barrier to federal habeas review." *Id.* (citing numerous Fifth Circuit decisions upholding forfeiture based on noncompliance with Texas's contemporaneous objection rule).

Given the arguments of four CCA judges in its original habeas decision denying relief, Respondent's emphatic post-remand argument that the lack of contemporaneous objection compelled forfeiture of Petitioner's constitutional claim, and the extensive federal authority sustaining forfeiture based on noncompliance with Texas's contemporaneous objection rule, it is simply implausible for Respondent to now claim that the CCA's original refusal to default Petitioner's claim was anything other than a genuine assessment of the adequacy of Petitioner's objection. In such circumstances, the CCA's imposition of its "egregious harm" standard based on Petitioner's purported failure to make a contemporaneous objection amounts to nothing less than a reversal of its decision rejecting the default argument prior to the remand. The imposition of the "egregious harm" standard thus constitutes a belated effort to revisit a procedural ruling only because this Court reversed the merits of the CCA's federal constitutional analysis.

b. Contrary to Respondent's assertions, the CCA's harmless analysis in this case was aberrational, and its decision marks the first time since that the CCA has withheld *Penry* relief based on a finding of no harm.

Respondent seeks to characterize the CCA's decision as a routine application of Texas

harmless error law. *See* BIO at 29. In fact, the CCA's conclusion that Petitioner failed to establish the requisite harm, notwithstanding its view that Petitioner offered "extensive" mitigating evidence in support of defense counsel's compelling argument that Petitioner's life was "worth saving," 185 S.W.3d at 471-72, constitutes a remarkable departure from its prior approach to *Penry* claims and to its manner of assessing harm.

When this case was remanded to the CCA, the CCA had never once applied harmless error analysis to a *Penry* claim despite having granted relief in several cases.[5] Likewise, the CCA did not mention harmless error analysis in its numerous decisions denying *Penry* relief during the sixteen year interval between *Penry* and the remand in this case.[6] Particularly telling is the CCA's refusal to apply harmless error analysis in its sole reversal on *Penry II* nullification grounds immediately following this Court's decision in *Penry I*. *Rios v. State*, 846 S.W.2d 310, 317 (Tex. Crim. App. 1992).[7] In this respect, the CCA followed the lead of this Court, which neither applied nor mentioned harmless error analysis in *Penry I* or *Penry II*.[8]

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[5] *See, e.g., Ramirez v. State*, 815 S.W.2d 636 (Tex. Crim. App. 1991); *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App. 1991); *Ex parte McGee*, 817 S.W.2d 77 (Tex. Crim. App. 1991); *Ex parte Williams*, 833 S.W.2d 150 (Tex. Crim. App. 1992).

[6] *See, e.g., Fuller (Tyrone) v. State*, 827 S.W.2d 919 (Tex. Crim. App. 1992); *Fuller (Aaron) v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992); *San Miguel v. State*, 864 S.W.2d 493 (Tex. Crim. App. 1993); *Robertson v. State*, 871 S.W.2d 701 (Tex. Crim. App. 1993); *Wheatfall v. State*, 882 S.W.2d 829 (Tex. Crim. App. 1994); *Smith v. State*, 898 S.W.2d 838 (Tex. Crim. App. 1995); *Mason v. State*, 905 S.W.2d 570 (Tex. Crim. App. 1995); *Heiselbetz v. State*, 906 S.W.2d 500 Tex. Crim. App. 1995); *Goff v. State*, 931 S.W.2d 537 (Tex. Crim. App. 1996).

[7] In *Rios*, the CCA found the special issues were inadequate to facilitate consideration of the defendant's low intelligence. The defendant's jury, like Petitioner's, had received a supplemental instruction, which the CCA characterized as "a clumsy attempt at jury nullification," 846 S.W.2d at 316, and the CCA ordered a new trial without applying harmless error analysis.

[8] Indeed, the absence of any harmless error analysis in *Penry II* is particularly revealing, because this Court did apply harmless error analysis in that decision to Penry's claim under *Estelle v. Smith*, 451 U.S. 454 (1981) (prohibiting use of uncounseled statements by defendant at the punishment phase that were obtained through state-appointed psychiatrist's post-arrest custodial interview with defendant), finding that Penry had not established that the admission of the challenged psychiatric report had a substantial and injurious effect on the verdict. 532 U.S. at 796. This Court's unwillingness to apply harmless error to the *Penry II* claim immediately after it had disposed of the *Estelle* claim on such grounds strongly implied that this Court viewed such analysis as inappropriate to claims involving jury nullification.

Only after the remand in this case did the CCA for the first time suggest that *Penry*-type error was amenable to harmless error analysis, *Penry v. State*, 178 S.W.3d 782 (Tex. Crim. App. 2005), though that case did not involve a nullification instruction. Moreover, the CCA refused to deny relief on harmless error grounds once it determined that the defendant had suffered "some" harm. *Id.* at 788.

Thus, the CCA, having consistently rejected harmless error for *Penry* claims prior to this remand, having determined that automatic reversal was mandated in context of a *Penry II* claim involving a "clumsy attempt at nullification," and having never applied its "egregious harm" test to a *Penry* claim of any sort, departed markedly on the heels of this Court's summary reversal in making Petitioner's case the first *Penry* claim ever to be subjected to its "egregious harm" standard.

Given this prior established practice, it is unsurprising that in its initial brief on remand, Respondent did not mention harmless analysis at all and insisted instead that the CCA should belatedly enforce a procedural default. Only after Petitioner had argued that harmless error analysis was inappropriate to jury nullification claims, and that in any event Petitioner's extensive mitigating evidence established harm, did Respondent urge the CCA to deem Petitioner's claim harmless. State's Reply Brief on Remand at 1 ("SRBR") (attached as Appendix 12). Even then, Respondent argued that the appropriate test of harm was whether "the error contributed to [Petitioner's] conviction or punishment." SRBR at 1 (citing *Fierro v. State*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1991)). Respondent did not mention, much less insist upon, the "egregious harm" test as the appropriate standard.[9] The fact that Respondent nowhere

[9] In such circumstances, Respondent's claim that Petitioner is somehow estopped from objecting to the CCA's

argued in favor of the "egregious harm" test further confirms that the CCA's decision to require "egregious harm" was not an ordinary application of state harmless error principles but the irregular imposition of a new and unprecedented burden in the wake of this Court's summary reversal.

CONCLUSION

The decision below rejects the core holding of *Smith* – that the nullification instruction precluded juror consideration of Petitioner's extensive mitigating evidence. The decision below also punishes Petitioner for his success in this Court by imposing a previously-rejected procedural obstacle and requiring an unprecedented degree of harm as a predicate for relief. For these reasons, this Court should grant certiorari to ensure compliance with its prior decision in this case and to preserve its role as the final arbiter of federal constitutional meaning.

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application of its "egregious harm" test because Petitioner did not specifically object to it below is simply bizarre. Neither party contemplated that the CCA would apply such a test, and, as Respondent concedes, BIO at 18, Petitioner plainly preserved the claim that Petitioner's extensive mitigating evidence precluded a finding of no harm on remand given this Court's decision. Petitioner cannot be faulted for failing to anticipate that the CCA would choose this case as the first and only occasion to demand a showing of "egregious harm" as a predicate for relief under *Penry I* or *Penry II*. Nor could Petitioner anticipate that the CCA would find no "egregious harm" by rejecting this Court's conclusion that jurors were unable to give adequate effect to Petitioner's mitigating evidence.